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Libel--Statute of Limitations--Effect of "Republication" (Wolfson v. Syracuse Newspaper, Inc. 254 App. Div. 211 (4th Dept. 1938))

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breach of a collective bargaining agreement? To date there have been no adjudications on this point.[16] This anomalous situation may be explained, undoubtedly, in that equity offers the more adequate relief.[17] In the case of *Gulla* v. *Barton*, the court by way of *dictum* said: "The agreement [collective bargaining] referred to was a valid contract, which may be enforced in any proper manner." [18]

The decision of the Court of Appeals in the instant case, unfortunately, did not pass upon the validity of such an agreement, *i.e.*, a collective bargaining agreement containing a "strike clause".[19] By holding that the complaint stated a good cause of action, it might be inferred that the contract was not contrary to public policy and, therefore, the breach thereof would satisfy subdivision "a" of Section 876-a of the Civil Practice Act.

B. B.

LIBEL—STATUTE OF LIMITATIONS—EFFECT OF "REPUBLICATION".—Plaintiff alleged that he was libeled by defendant in its publication of December 16, 1935. It was further alleged that defendant "republished" the libel in March, 1937 by allowing a third party to read copies of the newspaper kept on file in its offices. The present action was commenced on May 7, 1937, more than one year after the first publication but within the statutory period after the alleged "republication". *Held,* two judges dissenting, action barred by Stat-

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[16] Rice, *op. cit. supra* note 4, at 604.

[17] See note 6, *supra;* see also Comment (1932) 41 YALE L. J. 1221.

[18] 164 App. Div. 293, 295, 149 N. Y. Supp. 952, 953 (3d Dept. 1914); Keysaw v. Dotterweich, 121 App. Div. 58, 59, 105 N. Y. Supp. 562 (4th Dept. 1907); Stone Cleaning v. Russell, 38 Misc. 513, 515, 516, 77 N. Y. Supp. 1049, 1050 (1902), holding that the "plaintiff, if it has any cause of action, will have an adequate remedy at law, just as would any other employee wrongfully discharged. It will be possible for it [the union] to show the amount of services of the time specified in the contract rendered to the defendant by others than its members, and which its members might have rendered, and the consequent damages, if *any*." (Italics ours.)

This case also determines the rights of the individual employees, who are union members by virtue of a collective bargaining agreement. Such employees will be permitted to sue in their own names under the beneficiary contract theory, thereby repudiating the "agency" and "usage" theories. But *cf.* Langmade v. Olean Brewing Co., 137 App. Div. 355, 121 N. Y. Supp. 388 (4th Dept. 1910), which accepted the "usage" theory by way of *dicta.* For a very able study of this problem see Rice, *loc. cit. supra* note 4; see O'Keefe v. United Ass'n of Plumbers, 277 N. Y. 300, 14 N. E. (2d) 77 (1937). See WHITNEY, *op. cit. supra* note 13, at 118 *et seq.* for discussion of beneficiary contracts.

Jacobs v. Cohen, 183 N. Y. 207, 76 N. E. 5 (1905), holding that an action will lie against an employer by a union on a note given as security "to be applied as liquidated damages", if the collective bargaining agreement is violated by the employer.

[19] Instant case at 325, 18 N. E. (2d) at 295.

ute of Limitations [1] and motion to dismiss granted. In the publication of a defamatory article in a newspaper there is but one publication, and that at the time and place where the newspaper was first published. *Wolfson* v. *Syracuse Newspaper, Inc.*, 254 App. Div. 211, 4 N. Y. Supp. (2d) 640 (4th Dept. 1938).[2]

In the recent case of *Means* v. *MacFadden Publications, Inc.*,[3] the principle involved in the instant case was there passed upon. Therein it was held that sales of issues of magazines containing alleged libelous matter after the magazine had been originally placed on public sale did not constitute a republication of such matter and that the Statute of Limitations started to run from the date the magazine was first placed on sale and not from the date of subsequent sales by newsdealers.

The rule that owners and publishers of newspapers are liable for the publication of libelous statements is so well settled, that it needs no further discussion.[4] It is also established law that each and every publication gives rise to a separate cause of action in favor of the person libeled [5] and it consequently follows that the Statute of Limitations begins to run from the date of each publication.[6] In the instant case the question was presented whether allowing a stranger to read libelous matter on a date after the newspaper was issued constituted a "republication". A newspaper is printed on presses, and editions, so called, are printed continuously. News in the first edition may be dropped and new matter inserted in subsequent editions, but the same libelous article may appear in more than one edition the same day. It seems clear that where the defendant publishes the same libel in two *different* papers owned by the same publishers, there are two distinct publications and, consequently, a like number of distinct causes of action.[7] But where the libelous matter appears on the same day in different editions of the same paper (morning and evening editions), the cases are not clear as to the number of publications and causes of action arising. That such appearances do not constitute separate causes of action was decided in one case [8] and the broad

[1] N. Y. CIV. PRAC. ACT § 51, subd. 3.

[2] *Aff'd*, 279 N. Y. —, 18 N. E. (2d) 676 (1939).

[3] 25 F. Supp. 993 (D. C. S. D. N. Y. 1939).

[4] "It would be too much to say that any man might, with impunity, own and sustain a public newspaper without any responsibility for the libels with which it might abound." Andres v. Wells, 7 Johns. 260 (N. Y. 1810).

[5] Cerro de Pasco Tunnel & Min. Co. v. Haggin, 106 App. Div. 401, 94 N. Y. Supp. 593 (1st Dept. 1905); Fisher v. New Yorker Staats-Zeitung, 144 App. Div. 824, 100 N. Y. Supp. 185 (2d Dept. 1906); Underwood v. Smith, 93 Tenn. 687, 27 S. W. 1008 (1894).

[6] "A libel action is not barred where commenced within the statutory period after the date the article was reissued or republished." Mack Miller Candle Co. v. MacMillan Co., 239 App. Div. 738, 269 N. Y. Supp. 33 (4th Dept. 1934), *aff'd*, 266 N. Y. 738, 195 N. E. 167 (1934).

[7] Underwood v. Smith, 93 Tenn. 687, 275 S. W. 1008 (1894); Cook v. Connors, 215 N. Y. 175, 109 N. E. 78 (1915).

[8] Galligan v. Sun Printing and Pub. Ass'n, 25 Misc. 355, 54 N. Y. Supp 471 (1898).

language of the court in that decision led a court [9] in another jurisdiction to venture the erroneous opinion that where the libel appeared in the same paper on different days the repetition of the article prior to bringing suit on the original article did not give rise to a new cause of action. Thus according to the latter case, only where the repetition is made after the commencement of the action on the original article will such a reiteration of the offensive matter give rise to a new and distinct cause of action. That such holding is erroneous and contrary to the weight of authority is unquestioned.[10] It has been held that proof of the sale of one copy of a newspaper is proof of publication, yet it would be absurd to say that the defendant republishes the article every time a copy is sold on the street.[11] The great bulk of newspapers is delivered to newsdealers, and the sales by them are purely accidental and without premeditation. Although technically each sale is a publication, any one sale satisfies the rule of proving publication, and circulation merely proves the extent of the damages.[12] It is therefore conceded that if the plaintiff had commenced this action before the Statute of Limitations had expired, the scope of the circulation and the *preservation* of the issue containing the article would have been competent elements of damage by which the plaintiff's injury might have been measured; [13] but the contention that a *new* cause of action arose by virtue of the preservation of the article cannot be sustained.

The legislature, in drafting the Statute of Limitations, had as its object a purpose which it conceived to be imperative—to outlaw stale claims—and in the interpretation of the Statute the spirit and purpose of the act and the objects to be accomplished must be considered.[14] If the bar of the Statute could be lifted on the facts in this case, the term of "statute of repose" could no longer be applied to it, and the very purpose of the legislature would be defeated, and the Statute of Limitations would never begin to run so long as there was in existence a copy of the paper which was capable of being passed about or sold.[15]

By way of conclusion, it has been stated that the test of whether an article is a "republication" for which a separate cause of action might be maintained, should not depend on an interval of time, or a

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[9] Murray v. Galbraith, 86 Ark. 50, 109 S. W. 1011 (1908).

[10] Hearst v. New Yorker Staats-Zeitung, 71 Misc. 7, 129 N. Y. Supp. 1089 (1911), *aff'd*, 144 App. Div. 896, 129 N. Y. Supp. 1126 (1st Dept. 1911); Gordon v. Journal Pub. Co., 81 Vt. 237, 69 Atl. 742 (1908).

[11] Fried, Mendelson & Co. v. Halstead, Ltd., 203 App. Div. 113, 115, 196 N. Y. Supp. 285 (1st Dept. 1922); United States v. Smith, 173 Fed. 227 (D. C. Ind. 1909).

[12] Logan v. Hodges, 146 N. C. 38, 59 S. E. 349 (1907); Randall v. Evening News Ass'n, 79 Mich. 266, 44 N. W. 783 (1890).

[13] Ostrowe v. Lee, 256 N. Y. 36, 39, 175 N. E. 505 (1931).

[14] People v. Ryan, 274 N. Y. 149, 8 N. E. (2d) 313 (1937).

[15] Julie B. Means v. MacFadden Publications, Inc., *et al.*, 25 F. Supp. 993 (S. D. N. Y. 1939).

separate sale, but upon whether or not the act of republication was a conscious, independent one. The individual who sends the same letter to different persons does so consciously and intentionally, so that new causes of action would arise, whereas, in the case of a newspaper no conscious intent arises unless and until it intentionally "republishes" the article. In each case it is the conscious act which determines.[16] Here there was nothing active on the part of the defendant. Rather, its conduct would appear to be passive in character and does not indicate a conscious intent to induce the public or any individual to read the alleged libel. It was, at most, a gratuitous courtesy which was extended only after a third party had made a request therefor.

F. D. M.

MASTER AND SERVANT—"LENT" SERVANT—INDEPENDENT CONTRACTOR—TESTS OF LIABILITY.—Defendant's predecessor assigned part of his work of obtaining subscriptions for magazines to an independent contractor. By a written contract the latter assumed the cost and responsibility of transporting crews of young women to various territories to carry on the work. An employee of defendant's predecessor was sent to the independent contractor as the said predecessor's representative to go about with the crew and instruct them in salesmanship. The independent contractor gave said employee a place in his crew car on condition that he drive it. Plaintiffs were injured because of this employee's negligent driving and brought this action for personal injuries. Upon appeal from a judgment of the district court dismissing the complaint, *held,* affirmed. Where the performance of the contract of an independent contractor expressly includes the work performed by a "lent" servant, the independent contractor when he has control of such servant is the special employer and is liable for his tortious acts.

Under the doctrine of *respondeat superior* a master is liable for the torts of his servant committed in the scope and course of his employment.[1] But where two alleged masters are involved, as where the services of one's employee are utilized by an independent contractor, or where the servant is temporarily employed by a special master, it is often difficult to determine which of the masters is liable. The fact that the master sought to be charged paid the employee's wages,[2]

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[16] SEELMAN, LAW OF LIBEL AND SLANDER (1933) § 130.

[1] Wylie v. Palmer, 137 N. Y. 248, 33 N. E. 381 (1893); EDGAR AND EDGAR, LAW OF TORTS (3d ed. 1936) 76.

[2] Irolla v. City of New York, 155 Misc. 908, 280 N. Y. Supp. 873 (1935).